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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-613

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY AND CARPENTERS LOCAL UNION No. 1334,
Petitioner,

AGAINST

LUBBOCK CONSTRUCTION CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY AND CARPENTERS LOCAL UNION NO. 1334,
Petitioner,

AGAINST

LINBECK CONSTRUCTION CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Carpenters District Council of Houston and Vicinity and Carpenters Local Union No. 1334, by its attorney, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 14, 1972.

I.

OPINION BELOW

The Court of Appeals for the Fifth Circuit affirmed without opinion the judgment rendered by the District Court of the Southern District of Texas. Both appear in the appendix of this Petition.

II.

JURISDICTION

The Order of the District Court was entered on January 18, 1972. The Order of the Court of Appeals for the Fifth Circuit was entered on July 14, 1972. The Court of Appeals for the Fifth Circuit denied Petitioner's Petition for Rehearing and Petition for Rehearing En Banc on September 7, 1972. Petitioner was granted a Stay of Mandate to October 20, 1972 in which to file a Petition for a Writ of Certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

Did the District Court err in enforcing an arbitrator's award to himself?

IV.

STATEMENT OF THE FACTS

This case arose in early November of 1970, when a few carpenters working for Linbeck Construction Corporation left a job site in Baytown, Texas, and did not work for approximately three days. Thereafter, the attorney for Linbeck Construction Corporation sent numerous letters and telegrams to the attorney for the Union representing the carpenters involved, demanding that the Union arbitrate the amount of money owed to the Company because these carpenters had not worked for the best part of three days. The Union rejected the demand for arbitration on the basis that it presupposed that the Union owed the Company money for a "violation" of the contract that was not even defined, much less presented as an issue.

The Company continued to demand arbitration for the sole purpose of determining the damages owed to the Company, and continued to refuse to identify any part of the contract allegedly breached by the Union.

Ultimately, the Company filed a suit against the Union, with two counts. The first count alleged that the Defendant Union "refused to abide by the provisions of the aforesaid collective bargaining agreement" without further specification. The second count of the pleadings alleged that the conduct of the Union constituted "a violation of Section 301 of the Act".

Thereafter, the Defendant Union filed its Answer, a Motion for More Definite Statement, and a Motion to Dismiss. The Motion to Dismiss was filed pursuant to, *inter alia*, Rule 12(b)(6), alleging that the original pleadings did not set forth a cause of action.

Thereafter, in a pre-trial conference, the Court entered the following Order:

> "Pretrial heard. In this case, the court orders the parties to arbitrate but will retain jurisdiction of the law suit pending a determination by the arbitrator as to whether or not the dispute is one that is arbitrable. If the arbitrator decides the dispute is arbitrable then he will proceed with arbitration proceedings and determine the matter on its merits. If the arbitrator decides that the dispute is not arbitrable, this court will enter a further order relating to discovery."

Pursuant to the Order of the Court, a panel of arbitrators was obtained from the Federal Mediation and Conciliation Service, and each party struck two names. The resulting name on the panel thereafter became the arbitrator, and an arbitration hearing was conducted in Houston, Texas. In

the arbitration hearing, the parties presented their respective contentions as follows:[1]

The Union:

The Union contended that the six or seven carpenters who did not work for two or three days in November of 1970 were absent from the job site because of an internal union dispute over whether or not one of them was qualified to serve as an officer of the Union (steward), for that job site. The Union strongly argued that this internal dispute had nothing to do with the Company, and that it was accordingly completely outside the grievance and arbitration procedures. The Union has consistently argued that a purely internal union problem cannot by any application of logic or contract interpretation, be presented to the Company as a grievance.

The Company:

The Company contended that any failure on the part of the Union to have the job manned at all times constituted a work stoppage, and that any work stoppage constituted a violation of the contract.

In the course of the hearing, the Company actually conceded that it knew of no grievance against the Company that the Union could possibly have presented. Notwithstanding this admission by the Company, the Arbitrator ruled in his award that the Union violated the contract by not presenting the non-existent grievance to the Com-

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[1] The contentions of the parties are briefly set forth as an integral part of the case before this Court, and not because the Union urges that the Court should evaluate the merits of the case before the arbitrator.

pany, "without permitting the grievance to interfere in any way with the progress and prosecution of the work."[2]

In ultimate analysis, both arbitrability, and the merits of the arbitration case itself, depend upon the one controlling issue of whether or not the Union had a grievance against the Company. Thus, the question of arbitrability determines the whole case (except for the amount of damages), and in deciding arbitrability, the Arbitrator decided the whole case.

Subsequent to deciding that the Union should have presented its "grievance" to the Company for processing under Article V, rather than engaging in what the Arbitrator referred to as a work stoppage, the Arbitrator ordered the Union to instantly pay the Company the amount of $3,249.00, and provide the Arbitrator with an affidavit within five days swearing and affirming to the Arbitrator that the amount had been paid to the Company. Concurrently, the Arbitrator submitted a bill for $1,779.05, including expenses, and demanded that the Union pay half and the Company pay half. The Union thereafter informed the Arbitrator that it had never contracted for his services, had never agreed to his services, and that the underlying collective bargaining contract, unlike most others, did *not* provide for the Union to pay one-half of any arbitration proceedings. Upon receiving this response from the Union, the Arbitrator informed the parties that he had reopened the case and had reached a decision that his award should be supplemented, and issued the following order:

> "The union is hereby ORDERED to pay to the arbitrator within five days from the date of the receipt of this Supplement to Decision and Award the sum of

[2] Article V, Section 1, of the collective bargaining contract, styled "Grievance Procedure".

$889.52, covering one-half of fees and expenses for the original Decision and Award. In addition the union is ORDERED to pay to the arbitrator within five days from the receipt of this Supplement to Decision and Award an additional fee of $125.00, plus out-of-pocket expenses in the amount of $31.42, for a total payment for the Supplement to Decision and Award of $156.42. The total amount to be paid to the arbitrator by the union is $1,045.94."[3]

V.

REASONS FOR GRANTING THE WRIT

A. The Union never agreed to arbitration and never agreed to this arbitrator.

Every case presented to the Court by the Company, and every case in the District Court's Memorandum and Order, is based upon a fact situation wherein the union engaged in voluntary arbitration. None of them involved cases wherein the union was forced to arbitration, and forced to arbitrate a non-existent grievance, and to pay an arbitrator a fee which the union had never contractually agreed to pay.

This case is completely different from every other case involving court-ordered arbitration, in the sense that the work stoppage[4] did *not* involve any disagreement between

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[3] Neither party requested this supplemental award. Neither party presented any such issue for the Arbitrator's decision. Neither party was informed that the Arbitrator intended to supplement his award. Neither party was given any opportunity to present any evidence, argument or comment of any nature prior to the issuance of the supplemental award.

[4] The failure of these carpenters to work for two or three days because of an internal union problem is not actually a "work stoppage" in the normal sense of the phrase. In reality, their absence from the job site is as akin to an absence from the job based upon illness, or mass absences due to weather or civil calamities, as it is to the usual strike or work stoppage based upon a dispute arising between the company and the union.

the union and the employer. One of the first and most obvious arguments in response to the Union's contention that it never agreed to arbitration is that the Union agreed to arbitration when it signed the collective bargaining contract. This is simply not true, however, since the Union only agreed to arbitrate grievances arising out of disputes on the job site between the employer and the Union. The Union, for example, never agreed to arbitrate disputes involving the election of its officers, never agreed to arbitrate disputes over what employees would do at home on their own time, and in general, never agreed to arbitrate disputes over anything except disagreements between the Company and the Union on the job site.

Moreover, the contention that the Union agreed to this Arbitrator by "selecting" him is a myth. The Union no more voluntarily agreed to this Arbitrator than did it agree to be sued into forced arbitration in the first place.

B. The Union expressly omitted from the collective bargaining contract any agreement to pay the fees which the Arbitrator awarded himself.

Unlike the typical collective bargaining contract wherein an employer and a union agree to divide equally the fees and expenses payable in the arbitration of disputes between them, the Union in this case never agreed that it would undertake to split such fees and expenses. If the Union had been the party requesting arbitration, it is reasonable to conclude that the Union impliedly contracted for the Arbitrator's services, and that he should be entitled to a judgment for such services based on *quantum meriut*. If the parties had bilaterally agreed to arbitration, then it is reasonable to conclude that they both contracted for the Arbitrator's services.

However, in this case, after being careful to avoid any contractual commitment to pay for any arbitration expenses, the Union should not have any such contractual obligation written into the contract for it, by judicial force. This is all the more true when the Union resisted with all the means as its disposal the Company's unilateral engagement of the Arbitrator's services.

C. The Arbitrator awarded $1,935.46 to himself without giving the parties any opportunity to contest or challenge the amount.

The Arbitrator's "Supplement to Decision and Award" came as a complete surprise, if not to both parties, at least to the Union, and the Union was given no opportunity whatsoever to even challenge the Arbitrator's judgment in favor of himself. Had the Union been given the opportunity to do so, the Union would have participated in the Arbitrator's deliberations that led to the Supplement to Decision and Award.

The Union, if given the opportunity to do so, would challenge not only the indebtedness *per se*, but the amount thereof.

Even in quasi-judicial proceedings, before Special Masters, Referees in Bankruptcy, Arbitrators and Administrative Agencies, the involved parties are given advance opportunity to speak. Final judgment always follows presentation by the parties, whether such presentation be lengthy or brief, and never comes, in this judicial system, as a completely unexpected event, from which there is no appeal.

D. The Arbitrator's Decision and Award to himself has no basis in the contract and no such issue was presented for the Arbitrator's Decision.

The collective bargaining contract contains no reference whatsoever to the payment of Arbitrator's fees. Moreover, the contract, in its grievance and arbitration provisions, provides no contractual basis upon which the Arbitrator's Supplemental Decision and Award could possibly be made. In fact, a careful reading of the Supplemental Decision and Award finds it to be devoid of any reference whatsoever to the collective bargaining contract. As the Court stated in its Memorandum and Order, the Arbitrator's Award must draw its essence from the contract;[5] arbitrators have no legislative power, and certainly have no power to enrich themselves personally by simply ordering money to be paid to themselves, with expectation that the United States Courts will confirm such orders.

It is somewhat redundant to state that the issue decided by the Arbitrator in his Supplemental Decision and Award, *viz*, the payment of money to himself, was not presented to him as an issue. As heretofore stated, in fact, the Supplemental Decision and Award, and the subject matter thereof, came as a complete surprise. The Union at least has no conception of how the Arbitrator came to believe that this issue was submitted to him for decision.

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[5] See *United Steelworkers* v. *Enterprise Wheel*, 363 U.S. 593, *International Association of Machinists* v. *Hayes Corp.*, (USCA-5, 1961) 296 F2d 238, *Marble Products Co.* v. *Local 155*, (USCA-5, 1964), 335 F2d 468, *H. K. Porter Company* v. *United Auto Workers* (USCA-3, 1964), 333 F2d 496, *International Union of District 50* v. *Bowman*, 421 F2d 934, *Safeway Stores* v. *American Bakery and Confectionary Workers*, 390 F2d 79, *Textile Works* v. *Textile Paper Products Corp.*, 405 F2d 397.

E. If the Arbitrator's Award is sanctioned and enforced by this Court the Union will be deprived of valuable property without due process.

The Union, as an entity, should enjoy a constitutional right not to be deprived of its property without due process. If some person or organization claims to be owed money by the Union, that person or organization should be forced to pursue its claim in a court of law. No person, under the guise of interpreting a collective bargaining contract, should be allowed to privately, unilaterally, and on his own motion, decide that the Union owes him an amount of money calculated on no basis other than what the claimant would like it to be.

Due process, in this case, consisted of the Arbitrator deciding, in the privacy of his own mind, that the Union owed him an amount of money. From that point, the Arbitrator simply dictated an order requiring the Union to pay that amount of money, and had it sanctioned and enforced by a United States District Court. The issues of whether or not the Union owed the Arbitrator money, the amount of money owed, and when, where and how it should be paid, were all conceived, considered, and decided, by the Arbitrator, without notice to the parties.

The Union was deprived of:

1. Any notice that this judgment for money was going to be entered.
2. Any pleadings claiming the amount of money.
3. Any right to confrontation, or examination.
4. Any right of discovery or deposition.
5. Any right to challenge the amount of the claim.
6. Any right to challenge the validity of the claim.

7. Any right to contest the basis for the claim.
8. Any right of trial by jury.
9. Any appeal from the Arbitrator's judgment in favor of himself.

This Arbitrator certainly has a right to pursue any claim he may feel that he has against the Union or any other entity in a court of law. Courts of law are established for the purpose of allowing the parties to seek redress for real or imagined wrongs or indebtedness. The Arbitrator herein has shunned such processes, in favor of simply issuing his own edict, based upon the contention that he has a right to do so simply because he was chosen to arbitrate a labor dispute. If the Arbitrator's claim is valid, if the amount he seeks is just, and if the Union is not able to successfully defend against his claim for indebtedness, then the Arbitrator will have no problem whatsoever in collecting the amounts due him in a court of competent jurisdiction. Moreover, the laws of the State of Texas provide that any person being owed money may recover not only that indebtedness, but interest thereon, and attorney's fees necessarily incurred in the collection process. If denied enforcement of his private and personal Award to himself, the Arbitrator will suffer no more than being relegated to the same status as any other citizen seeking collection of an alleged debt, and will be deprived of nothing more than an attempt to circumvent the judicial process.

F. If this Arbitrator's sua sponte Award of money to himself is sanctioned and enforced by this Court, a hazardous precedent will be set.

The amount this Arbitrator awarded to himself is by no means admitted to be reasonable, and if the Union had been given or is eventually given an opportunity and a forum in

which to contest the claim of indebtedness, the Arbitrator may collect, if anything at all, something far less than what was recited in his original demand. However, the amount could have been more exorbitant, and if this precedent is set, then the way will be open and clear for all future aribtrators' having the inclination to do so, to close up every arbitration hearing by awarding themselves judgments for services rendered. If the District Courts as did this District Court, approve such personal judgments without even allowing a contest to the claim, whether by the company or the union, then there will be the equivalent of a money judgment in a United States District Court in favor of any arbitrator seeking a avail himself of this precedent. Seeking a money judgment in a District Court of the United States is a process that is heavily imbued with due process, rules, and provisions for fair play and equity. All this will disappear under this precedent.

At present, in the field of labor relations, no one knows of any particular qualifications which any arbitrator has to meet prior to being selected to settle a labor dispute. As far as can be ascertained, an arbitrator need only be a living person in order to qualify. There is at the moment an increasingly urgent need for some sort of governmental control over the qualifications of arbitrators that have come to have such enormous power in the field of labor relations, by virtue of the trend of Federal Court decisions enforcing arbitrational awards.

VII.

CONCLUSION AND PRAYER

A Writ of Certiorari should issue and the Order of the Fifth Circuit should be reversed.

Respectfully submitted,

LAW OFFICES OF
WILLIAM N. WHEAT

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Carpenters District Council
of Houston and Vicinity and
Carpenters Local Union
No. 1334

VIII.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon the folowing by United States Mail, postage prepaid, on this the 17 day of October, 1972:

CERTIFIED MAIL:

Mr. A. J. Harper, II
Fulbright, Crooker & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

WILLIAM N. WHEAT

APPENDIX

Order Below Upholding the Arbitrator's Decision and Award

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-117

LINBECK CONSTRUCTION CORPORATION

v

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VINCINTY, ET AL

Memorandum and Order:

Plaintiff brought this suit to compel arbitration under the terms of a collective bargaining agreement, or, alternatively, a suit for damages under Section 301 of the National Labor Relations Act, as amended 29 U.S.C. § 141-87 (1965).

At a pretrail conference, this suit was submitted to an arbitrator to determine if the grievance was in fact subject to arbitration. The arbitrator did find the grievance subject to arbitration and in accord with this court's pretrial order, he proceeded to determine the matter on its merits.

Upon consideration of all pertinent matters, the court orders judgment in favor of Plaintiff, enforcing the arbitrator's award. This decision is based both on the collective bargaining agreement and on national policy.

This court finds that the arbitrator's award does "draw its essence from the collective bargaining agreement" as required by *United Steelworkers of America* v. *Enterprise*

Wheel and Car Corp., 363 U.S. 593, 4 L.Ed.2d 1424 (1960) and *International Union of District 50, United Mine Workers of America* v. *Bowman Transportation, Inc.*, 421 F2d 934 (5th Cir. 1970). This writer has further stated in a previous case that having determined that an award clearly indicates that it finds its source in the collective bargaining agreement, "judicial inquiry should end, for when an award draws its essence from the collective bargaining agreement," it is not open to a court to assay the legal correctness of the reasoning pursued. *Safeway Stores* v. *American Bakery and Confectionary Workers Int'l*, 390 F.2d 79, 83 (5th Cir. 1968). *Textile Workers Union* v. *Textile Paper Products, Inc.*, 405 F.2d 397, 399 (5th Cir. 1968).

This court also bases its decision on the national policy that encourages arbitration as a device to settle industrial disputes. *Enterprise, supra.*

Plaintiff's motions for enforcement of the arbitrator's award and for attorney's fees reasonably incurred with the original action are granted. Plaintiff is entitled to recover necessary attorney's fees in securing compliance with the terms and obligations of the collective bargaining agreement. *Sheet Metal Workers* v. *Atlas Sheet Metal Co.*, 284 F.2d 101, 110 (5th Cir. 1967). The plaintiff will also be awarded attorney's fees for seeking compliance with arbitrator's award where a party has without justification refused to abide by the arbitrator's award. *Local No. 149 I.U.A.A. & A.I.W.* v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir 1962); *Bowman, supra.*

As to the question of abritrator's fees, it has been generally accepted that, in the absence of agreement or statute, the general law would appear to be that the parties are jointly and severally liable for the payment of arbitrators' fees. 3 Am. Jur. 927. *Theofano Martime Co.* v. *9.551.19 Long Tons, Etc.*, 122 F.Supp. 853 (Maryland 1954). When

the arbitrator's award has been submitted to the court as was done here the matter of the arbitrator's fee may be considered by the court. 5 Am. Jur. 2d *Arbitration and Award* § 106. Where the amount has not been fixed by express agreement, what is due the arbitrator is a matter of fact. *Paine* v. *Kentucky Ref. Co.*, 159 Ky. 270, 167 S.W. 375. The facts of this case reveal that the fee requested is reasonable for the services rendered and are approved by this court.

Accordingly, the arbitrator's award including that for the arbitrator's fee is approved by this court.

Linbeck Construction Company's motion for enforcement of arbitrator's award and for attorney's fees is granted.

Done at Houston, Texas, this 18th day of January, 1972.

/s/ JOHN V. SINGLETON
United States District
Judge

Order Below Affirming the District Court's Opinion

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1586

SUMMARY CALENDAR*

LINBECK CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY, ET AL.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 14, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5 Cir. 1970).

Order Below Issuing Judgment Affirming the District Court's Judgment

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 72-1586

SUMMARY CALENDAR*

D. C. Docket No. CA 71-H-117

LINBECK CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY, ET AL.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BELL, DYER and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 14, 1972

Issued As Mandate:

Order Below Denying Petition for Rehearing En Banc

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1586

LINBECK CONSTRUCTION CORPORATION,
Plaintiff-Appellee,

v.

CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY, ET AL.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 14, 1972, 5 Cir., 1972, —— F.2d ——).

(September 7, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.